CFS North American, Inc. d/b/a Convenience Food Systems, Inc. ***and*** **Anthony Lyle Varnes** ***and*** **Quinton Til Graham.** Cases 16–CA–22135–1 and 16–CA–22135–2

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 21, 2003, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CFS North American, Inc. d/b/a Convenience Food Systems, Inc., Frisco, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its Frisco, Texas location copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 2002."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 27, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Dennis P. Walsh	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union activities, union membership, the union activities of other employees, the union membership of other employees, why they support a union, or the identities of employees engaged in talking about a union.

WE WILL NOT prohibit you from talking about a union.

WE WILL NOT prohibit you from talking about wages and other working conditions.

[1] The judge found that the Charging Party is a labor organization within the meaning of Sec. 2(5) of the Act. However, the Charging Parties are the individual discriminatees, Anthony Varnes and Quinton Graham. This inadvertent error does not affect our decision.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to conform to the recommended Order.

WE WILL NOT threaten you with trouble and with possible discharge if you do not reveal your union and protected concerted activities.

WE WILL NOT maintain a policy which prohibits you from discussing your salaries and other conditions of employment.

WE WILL NOT issue warnings to you because of your union and protected concerted activities, and WE WILL NOT discharge you because of your union and protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the policy prohibiting employees from talking about wages or other working conditions.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Varnes and Quinton Graham full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Varnes and Quinton Graham whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful warnings and discharges of Anthony Varnes and Quinton Graham, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful warnings and discharges will not be used against them in any way.

CFS NORTH AMERICAN, INC. D/B/A CONVENIENCE FOOD SYSTEMS, INC.

Nam Van, Esq., for the General Counsel.
Paul Lehner, Esq., for the Respondent.
William A. Walsh, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on March 17, 18, and 19, 2003, in Fort Worth, Texas. The complaint alleges Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union and protected activities and those of other employees, and threatening employees with termination and other consequences. The complaint also alleges Respondent violated Section 8(a)(1) and (3) of the Act by issuing warnings to and discharging the two individual Charging Parties. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs, which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in Frisco, Texas, where it is engaged in the manufacture and sale of food processing, preparation, marinating, and packaging equipment. During a representative 1-year period, Respondent sold and shipped from its Frisco, Texas facility goods valued in excess of $50,000 directly to points outside the State of Texas. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

During 2001, Respondent, which is a company based in the Netherlands, purchased another company located in Columbus, Ohio. The other company, Wolfking, also manufactures food processing equipment, and Respondent began consolidation of the two companies, which was completed in about December 2001. In early 2002, the Wolfking operation was physically moved to Texas. Also in January 2002, Jan Erik Kuhlmann, formerly president of Wolfking, became the president of the consolidated Respondent and relocated to Texas. Two other managers also moved to Respondent from Wolfking at that time; Bryon Stricker became the executive vice president of finance, and David Devich became director of information technology (IT). Both of these individuals are admitted supervisors.[1]

Employees Quinton Graham and Anthony Varnes were employed in the IT department. Graham had worked for Respondent since April 2001. His job included developing, maintaining, and overseeing Respondent's computer systems, including the e-mail system. In mid-2002, he was asked to assist Respondent's global IT team, which was attempting to coordinate all of Respondent's computer communications, wherever located. Varnes worked as a contract employee from August 2001 through January 2002, when he was offered and accepted employment as a regular employee at Respondent. Varnes was a systems administrator, which involved backing up Respondent's data stored on computer, as well as assisting people throughout the Company with using the computers. In July 2002, Varnes was asked to work with Respondent's global IT team, also. Both of these employees were supervised throughout 2001 by John Attora, a supervisor who was replaced by David Devich in January 2002. Varnes was quite skilled in the

[1] At the hearing, the complaint was amended to allege that Tony Bayat was a supervisor. Respondent admitted Bayat's supervisory status.

use of computers, and he owned his own server at home. At the request of his supervisor, John Attora, Varnes sometimes used his home server to assist Respondent by testing software, and backing up Respondent's data. Varnes' home server was able to perform more functions than was Respondent's.

2. Respondent's October 2001 consolidation plan

In mid-October 2001, Varnes was requested by his supervisor to use his home server to receive and forward a lengthy e-mail from Kuhlmann in Columbus, Ohio, to several managers in Frisco, Texas. Apparently Respondent's server was unable to deal with the lengthy document. Varnes agreed to allow Respondent to use his home server for this purpose. When the document was received, Varnes transmitted it to the managers for whom it was intended, and checked it to make sure it had not become garbled during transmission, as sometimes happens to large attachments. Varnes opened the document on his computer in order to check it. Varnes' computer screen uses a pale buff-colored background to reduce eyestrain.[2] When Varnes viewed the document, which he was checking, he could see numbers printed in white against the buff-colored background, identified as proposed salary information for managers, supervisors, and employees at Respondent. Apart from telling Varnes to forward the document to two managers in Frisco, Attora did not give Varnes any instructions about what to do with the document. He gave Varnes no instructions about deleting the document from his server, and he did not say anything to Varnes about confidentiality. After Varnes had checked and transmitted the e-mail document (the October e-mail), he did not look at it again until February 2002, during a discussion with his supervisor, Devich.

3. Respondent's Confidentiality Agreement

In February 2002, some weeks after his hire as a regular employee, Varnes was presented with Respondent's "Confidentiality Agreement" and asked to sign it. An employee signing the agreement acknowledges knowing "confidential or proprietary information" relating to CFS, which is "not generally known to the public" or is a "competitive asset" or "trade secret." The examples listed are: planning data and marketing strategies, new products and strategies, personnel matters, financial results and information about its business condition, agreements or material contracts, proprietary software, clients, prospects, and contact persons, and material information concerning Respondent's customers, their operations, their plans, and condition. In the second paragraph of the agreement, the employee promises not to divulge such information unless and until the information has become "stale, or . . . generally known to the public" or the employee is required by law to do so. Before signing the agreement, Varnes wanted to ask Devich some questions about it. Varnes testified that he did not know whether the information that had been sent to his server in the October e-mail would be covered under the agreement. As Devich did not know what information Varnes referred to, Varnes contacted his home server and brought up the October e-mail on his screen, specifically the listing of salaries in the plan. As Graham worked in close proximity to Varnes, both he and Devich looked at the document. Devich told Varnes that the salary figures on the October e-mail were not accurate, that they were merely estimates, and that they were "old news" in any case. He added that the file was "pretty much junk." The three looked at the figures on the document and joked about what had been estimated as salaries for various positions. At no time did Devich tell Varnes that the information in the document was confidential.[3] Thus reassured, Varnes signed the Confidentiality Agreement. Graham had also signed an identical agreement during February 2002.

It is undisputed that the October e-mail contained no "watermark" (shaded background writing or icon) or "mood stamp" designating it as confidential, which was sometimes the case with Respondent's confidential documents. While the estimated salary figures had been printed in white colored printing, such printing would be invisible *only* if the recipient's computer were set up with a white background color scheme. Only the cover page contains a standard statement in small type that the document "may contain" proprietary or confidential information. Except for checking the e-mail when it arrived in October, and this occasion in February, when Varnes checked with Devich about whether the confidentiality agreement covered the October e-mail, Varnes did not open and view the document again during his employment with Respondent.

4. Respondent's changes and employees' discussions about them

After the completion of the merger with Wolfking, Respondent's new management made several changes. Among these were changes in the 401(k) plan distributions. A rather cryptic e-mail from Human Resources Manager Ann-Marie Noyes admittedly confused many people, both employees and supervisors, and she was requested to clarify the change. Noyes sent out a second memo concerning the 401(k) plan. Respondent also increased the amount of employees' contribution to their health care insurance coverage. Both of these changes were announced in February 2002.[4]

Varnes had heard a comment from Devich in January concerning the former Wolfking facility in Columbus, Ohio. According to Varnes' recollection, Devich opined that it would be cheaper for Respondent to operate in the Columbus facility. While in the IT office, Devich also remarked to another person that he believed Respondent would be back in Columbus within a year. In addition, both Varnes and Graham had heard a rumor circulating in the plant that Respondent planned to put the parts department in the Columbus facility.

According to both Graham and Varnes, they were confused about the benefit changes and upset about them as well. Both employees talked together about the changes. They talked with other employees at smoking breaks and other breaktimes about

[2] This color scheme is called "Plum," and is available in the Windows operating system.

[3] Devich admitted that this incident occurred, but he recalled little about the incident. He repeatedly stated that he did not recall certain aspects of the incident. Both Graham and Varnes demonstrated good recall and testified clearly and in detail to the events. Where Devich's testimony differs from that of Varnes and Graham, I credit them.

[4] All dates are in 2002, unless otherwise noted.

the same subjects. One employee told Varnes that he thought the 401(k) plan was "going away," but Varnes responded that only the distribution options had been changed. Employees discussed this issue, as well as the health benefit changes. During these discussions about the changes in benefits, employees also sometimes discussed their wages and those of other employees and managers. The employees also discussed the possibility that Respondent might move its operation, in whole or in part, to Columbus, Ohio, and the effect that would have on their jobs. During February and March, both Graham and Varnes were part of many discussions about these topics.

At about the same period, Graham talked to Varnes about the idea of unionizing the employees. Graham mentioned this idea to employees Jacob Usery, Chuck Navinger, and approximately 15 other employees during his discussions with them on the subjects described in the previous paragraphs. Graham and Varnes decided that they would try to get signatures of employees who were in favor of a union, but had not yet begun to do so on March 20.

5. Devich's March 20 and 21 discussions with Graham and Varnes

On March 20, Devich took Graham to a private space and told him that one or two employees had informed Respondent that Graham had tried to get them to support a union. Devich went on to ask Graham if he was a member of a union, and had he ever been a member of a union. Devich asked Graham if he was organizing a union. Graham answered all these questions in the negative. Devich, however, continued to ask Graham who among the employees he had talked to. Graham just answered, "guys in the smoking area," and when pressured by Devich for names, Graham refused to give them.

After work that day, Graham called Varnes and told him what had happened. He also searched the website of a union,[5] and asked that union, via e-mail, whether he could get fired for organizing a union.

The following morning, Graham sought out Devich and told him that he had indeed been talking to other employees about a union. Devich asked him why. Graham responded, "We don't trust management," and cited the benefits cost increases and other changes. Devich again asked Graham for the names of employees to whom he had talked about a union, but Graham refused to give the names.

About 2 weeks later, Devich again took Graham to a conference room alone and told him that he would get a written reprimand for his conduct. Graham asked what the warning was for, and Devich said it was for lying. It is undisputed that Graham had no other discipline during his employment with Respondent.

On March 20, Devich also talked with Varnes, alone in the IT office at the end of the workday. Devich told Varnes that Graham was in trouble. He asked Varnes if he had heard Graham talking about a union. Varnes denied this. Devich went on to ask Varnes if Graham was organizing for a union or was a member of a union, and whether he had talked to anyone about a union. Varnes denied any knowledge of union activities. He testified that he lied about this because he was scared about his own job, and the jobs of other employees. Varnes asked Devich if Graham was in trouble, and Devich responded that he was, and even more so if he was lying about it. Varnes asked if Graham would be fired. Devich said that he didn't know, but that it was definitely a possibility. According to Varnes, Devich repeated all these questions a second time. Varnes was also warned after this discussion with Devich. Like Graham, Varnes had no discipline on his record.[6]

Within a day or two of Devich's meetings with Graham and Varnes, Respondent's president, Jan Kuhlmann, called a meeting of employees to address some of the employees' concerns, such as the confusion over the 401(k) plan, and the fear of relocation. He told the employees that their fears were all groundless.

A little more than 2 months later, on June 12, Devich sent an e-mail to Human Resources Manager Noyes, in which he discussed another memo he had written concerning Graham's "union discussions." Devich said that he had had a meeting with Graham where he "lied about his involvement" in the "union discussions." Devich wanted to be sure to document this, and that Graham was informed "what was wrong about his conduct and that it was serious enough that he could have been terminated because of it."

According to Respondent's witness, Claude Villegas, an employee, Supervisor Tony Bayat asked him to continue to talk to Varnes and Graham about the Union, and to report back to Bayat about it.[7]

6. Employees' activities from April to July

After being warned for their union discussions, both Graham and Varnes stopped their discussions with other employees about the Union. Employees, however, continued to discuss issues at work as they arose. One subject was the possible introduction at Respondent of a "hand scanner," a security device that identified employees by their hands. In employees' discussions at breaks and lunch, some employees expressed uneasiness about the device. On one occasion in July, Graham stated during one of these discussions that maybe a union would have been a good idea. Another subject, which was frequently discussed, was salaries of employees, their seniority, and what

[5] Service Employees International Union.

[6] In his testimony, Devich admitted that he talked to Graham and Varnes because he was told that there were rumors about plant relocation and about union talk, and that the first thing he asked them was whether they had heard any union discussions. He denied asking about the employees' union activities or membership, but later admitted that he had asked Varnes if he had talked to employees about a union. His testimony was imprecise, he contradicted himself, and his recollection was not clear, by his own admission. In addition, Devich's June e-mail about the two employees' "union discussions" tends to support the testimony of Graham and Varnes. Where his testimony differs from that of Graham and Varnes, I credit them over Devich.

[7] The General Counsel moved, near the end of the hearing, to add this conduct as a violation of Sec. 8(a)(1). The motion was denied, and the General Counsel has renewed the motion in his brief. I again deny the motion. I am not convinced that Respondent had the opportunity fully to litigate the issue in view of the late motion. In addition, an almost identical violation is found below, and the addition of this incident would not alter the remedy herein.

kinds of salaries could be earned elsewhere. According to Graham and Varnes, employees also engaged in general talk about the salaries of Respondent's management team, to the effect that their salaries were significantly less than those of the management team they had replaced several months earlier, and speculation about the relative competence of the two management teams.

In June and July, both Graham and Varnes began to work with the "global IT team," a committee in the wider corporate setting. Graham's participation took him to one of Respondent's European locations for 2 weeks of work in July.

7. Events of August

Mike Garcie and Kelly Moore, two employees who had been participants in the July discussions among employees concerning hand scanners, privacy concerns, and salaries, went to supervisors and expressed their concerns on about August 8. According to the testimony of all witnesses, their concerns were primarily with the hand scanners,[8] but they also mentioned that employees had discussed salaries of other employees as well as salaries of managers. Manager Paul Conover tried to reassure the two employees about the hand scanner, and he questioned them further about employee discussions about salaries. Both employees identified Graham and Varnes as being two employees who talked about salaries. Conover reported to Stricker that the employees were concerned about privacy issues because of the salary discussions, despite the fact that his own testimony reveals that their primary concern was the hand scanners. The following day, Stricker and Kuhlmann talked with the two employees who had reported to Conover. They did not, however, interview either Varnes or Graham concerning the matter. Stricker, Kuhlmann, and Noyes then decided to discharge Varnes and Graham because they had been giving "confidential information," i.e., salary figures, to "employees who had no business to have it."

Noyes testified at the trial that this decision was based on the language in the Confidentiality Agreement concerning "personnel matters." At the time of this decision, none of the three managers was aware of the source of the salary figures being discussed by employees. No investigation was made of whether some employees had voluntarily told other employees what their salaries were. The managers had apparently forgotten that Kuhlmann had sent the October e-mail to Varnes' personal server located at his home. No investigation was made of that fact, nor of the accuracy of the information employees had discussed. Several witnesses testified that some of the salary figures quoted to him by Moore and Garcie were accurate or "approximately" so. Noyes testified that it was a violation of Respondent's confidentiality policy if employees talked about salary figures, which were specific and accurate, but not if the salary figures discussed were not accurate. In response to a leading question from counsel, she later added that it would also be a violation if the salary figures "appeared to be accurate" to the employees who were part of the discussion. Noyes further testified that it did not matter if the figures discussed or revealed were only those of other employees or whether they included management salary figures, that in either case, it was a violation of the policy. Devich began to seek replacement employees for the positions occupied by Varnes and Graham immediately. I find that Respondent had determined to discharge Graham and Varnes before their discharge interview on August 13.

It is undisputed that in the course of its investigation Respondent asked three or four employees about their conversations with Varnes and Graham concerning working conditions. This conduct was not alleged as a violation of the Act.

On August 13, Varnes and Graham were called to a meeting in the executive conference room. Stricker and Devich were present, also. Stricker told the two employees that Respondent had been informed that they had divulged specific, confidential salary information of other employees and managers. Graham stated that they had indeed had many conversations about wages in the smoking area. Varnes asked Stricker if he was talking about the October e-mail, and Stricker said that he was. Varnes stated that it was not confidential, and that Devich had known for months that Varnes had access to it. Devich did not deny this. When Graham wanted to know what Stricker was going to do, Stricker said that he should have dealt with the matter more aggressively 8 months ago. Graham asked Stricker whether he was referring to the warning about his union discussions, and Stricker angrily replied that he had no problems with unions. Graham asked Stricker why he was threatened, then. Stricker then discharged Graham and Varnes. He gave them discharge letters that had been prepared in advance of the meeting.

On August 15, Stricker drafted a memorandum concerning the discharge of the two employees, dating it August 8.

B. Discussion and Analysis

1. 8(a)(1) and (3) allegations in March and April

Graham and Varnes discussed their health plan, the 401(k) plan, wages, and the possibility of the plant relocating with one another and with other employees. All these things are clearly terms and conditions of employment. Likewise, there is no issue as to the concerted nature of their activities; their discussions were all with other employees. In addition, Graham and Varnes also discussed organizing a union with the same employees.

Devich's interrogation of both Graham and Varnes took place in private and in one-on-one conversations. Graham was told that the interrogation was "serious" and Varnes was told that Graham was in trouble. Discipline followed the interrogations. Graham was asked about his own union activities and membership, and discussions with other employees. Varnes was asked about Graham's union activities and membership, and discussions with other employees. Both employees were asked to name the other employees who participated in the union discussions. Devich's remarks to Graham that he could be in "big trouble," particularly if he was not confessing his union activities, and that the trouble could include the possibility of termination were threats of consequences, including termination, because of Graham's union activities. All these fac-

[8] One employee testified that he feared the scanner could record his fingerprints.

tors weigh heavily in favor of finding the interrogation coercive.

Respondent's asserted defense that it was only warning the two employees because they had spread false information is without merit. The evidence shows that they were specifically warned about union discussions, and the credited evidence does not show discipline for spreading "false rumors." Even if Respondent had actually warned the employees about the supposed falsity of the beliefs underlying their discussions about working conditions, this would not avail as a defense. The fact that employees may be mistaken in some facts when they discuss their working conditions does not remove them from the Act's protection. Cf. *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995). Respondent did not prove any bad faith or other misconduct which would remove the employees' conduct from the protection of the Act.

I find that Respondent violated Section 8(a)(1) of the Act by coercively interrogating Graham and Varnes about their union activities and those of other employees, coercively interrogating Graham and Varnes about Graham's union membership, why Graham was interested in a union, and which other employees were involved in the discussions. I further find that Respondent violated Section 8(a)(1) by threatening Graham with trouble and with possible termination, and by telling Varnes that Graham was in trouble because of his union discussions. *Paper Mart*, 319 NLRB 9 (1995). I further find that Respondent violated Section 8(a)(3) of the Act by issuing warnings to Graham and Varnes because of their union discussions with other employees.

2. Legal framework

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.989 (1982), the Board established its analytical framework for deciding cases of alleged violations of Section 8(a)(3) of the Act which involve employer motivation. To prove a violation, the General Counsel must show, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision to discharge or discipline an employee. The General Counsel must show union or protected concerted activity by the employee, employer knowledge thereof, and employer animus towards the activity. In addition, there must be a showing of some connection between the employer's animus and the action taken against the employee.

If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.[9]

[9] The General Counsel contends that here, a *Wright Line* analysis is unnecessary, since the reason for the discharge is not disputed, citing *Phoenix Transit System*, 337 NLRB 510 (2002). Under that case, if the reason for the discharge was itself protected activity the Board need only determine whether the employee's activity lost the protection of the Act for some reason. Here, the analysis of Respondent's defense based on its Confidentiality Agreement would essentially mirror an analysis of whether the employees' activity "lost the protection of the Act" on the basis of that same defense.

3. Prima facie case

The fact that Graham and Varnes engaged in discussions with other employees in March concerning a union, salaries, health care premiums, the 401(k) plan, and possible relocation of the plant is not in dispute. The fact that the same two employees talked with other employees about salaries and the hand scanner in July is likewise not in dispute. Neither does Respondent dispute its knowledge of these activities. Respondent admitted in its answer that it issued verbal warnings to both employees in March and that it discharged both employees on August 13. Because it has been found above that Respondent's conduct in March violated Section 8(a)(1), it is apparent that Respondent has demonstrated considerable animus against the employees' union and protected activities. At issue, then, is Respondent's motivation for discharging Graham and Varnes.

The stated reason for the warnings to Varnes and Graham was their "union discussions" with employees. This phrase was reiterated by Devich in his June 12 e-mail to Noyes. This is clear evidence of animus towards the union activities of the two employees. Additional evidence of animus can be found in the failure of Respondent to interview Graham and Varnes in its "investigation" immediately prior to their discharge. Although the discharges occurred more than 4 months after the warnings, they occurred at a time when Respondent had just learned that Graham and Varnes had continued to engage in discussions about wages and working conditions with their fellow employees. Stricker's comment in their discharge interview to the effect that he should have taken care of their situation "months ago" is a reference back to the warnings for union discussions. I find that it referred to the February and March union and concerted protected activities of the two employees. This remark is strong evidence of a nexus between the employees' protected activities and Respondent's discharge of the two employees.

4. Respondent's defense

Respondent contends that Varnes and Graham would have been discharged even absent their concerted protected activities because they violated a valid company policy against disseminating confidential information. Respondent relies on *International Business Machines Corp.*, 265 NLRB 638 (1982), where an employee who reprinted and distributed to other employees a confidential list of salaries which had been mailed to him in error was discharged lawfully. The Board found that the employer there had a valid policy for which it had established a substantial and legitimate business justification, and that employees' rights to discuss their wages were not so adversely affected by the policy as to be rendered meaningless. The Board further found that the employee knew that the documents he received were classified as confidential, and was aware that he would violate the policy by disseminating them. The Board stated that the employee had not obtained the information under circumstances that would lead him reasonably to believe that his possession and dissemination of the material was authorized.

Respondent here has no rule prohibiting employees from talking at work or at breaks. Respondent's policy regarding confidential information (its Confidentiality Agreement) appears to be aimed primarily at keeping trade secrets and other

proprietary business information within the company, and not available to competitors or the public. In addition, the words "personnel matters" are included in the listing of confidential information. Respondent relied on the prohibition on disseminating "personnel matters" in deciding to discharge Graham and Varnes.

Respondent's witness Noyes testified that the policies contained in the Confidentiality Agreement do not prohibit employees from telling one another their own salaries, or guessing what different employees are paid, but the policy does prohibit employees from discussing employees' wages if they are using specific, accurate numbers. In response to a question from Respondent, Noyes added that discussions of salaries that "sound specific to the employee who is hearing them," would also violate the policy. Noyes also testified that it did not matter whether employees were discussing only employees' salaries, or were also discussing supervisors' and managers' salaries. Noyes' description of an unwritten "policy" based on two words included in the Confidentiality Agreement (a document with the major purpose of protecting trade secrets) was so specifically tailored to the precise situation which Respondent believed existed on August 8, that it is persuasive that the unwritten policy was created on the spot as a pretext for discharging Varnes and Graham.

The policy treated all discussions of salaries the same. As such is the case, it is unnecessary to reach the issue whether a rule prohibiting discussion or disclosure solely of management salaries would impinge on employees' Section 7 rights. Here, the prohibition was broad and indiscriminate; it did not distinguish between discussion of managers' or employees' salaries. It prohibited disclosure and discussion of *any* salaries, even if the discussion was limited to nonsupervisory employees' wages and salaries. As such, it is clearly within the long-settled Board precedent cited below.

Aside from the language of the policy itself, and Noyes' reference to "private information" which might be upsetting to employees to be discussed, Respondent did not adduce evidence of business justification for prohibiting discussion of accurate pay information by employees, while permitting discussion of generalized, inaccurate pay information.

This case is distinguishable from *International Business Machines Corp.* for two reasons. First, the employees here were discharged for *talking about* salaries, not for a discrete act of dissemination of a particular document. There was no mention of the October e-mail in the employees' discharge interview, and no accusation of disseminating it in writing.

Second, Respondent's rule or policy is clearly distinguishable from that in *International Business Machines Corp.* Respondent's rule is not written, and is certainly not explicitly stated in the Confidentiality Agreement. It is a gloss on a general phrase found in the Confidentiality Agreement dealing with "personnel matters." No justification was offered by Respondent for the prohibition on employees' discussion of salaries. That such a rule is normally unlawful is eminently clear in Board law. *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). See also *Paper Mart*, supra; *Mobil Exploration & Producing U.S.*, 323 NLRB 1064 (1997). In the last cited case, the Board found that even though the employer had a rule prohibiting dissemination of salary information, the employee there had discussed the information with other *employees* only, and had not given it to competitors of the employer. Therefore, the Board reasoned, there was no legitimate business justification for confidentiality. The same is true in this situation.

Respondent's policy as applied to Varnes and Graham is overbroad, is not justified by any legitimate business considerations, and violates Section 8(a)(1) of the Act. *Automatic Screw Products Co.*, supra. The discharges of Varnes and Graham based on this unlawful policy likewise violate Section 8(a)(3) of the Act.

The credited testimony of Varnes and Graham established that the salaries of employees they discussed were known to them either from rumors, from other employees, or from the October e-mail. Unlike the employee in the *International Business Machines Corp.* case, they never published the October e-mail or showed it to other employees. Respondent did not investigate where Varnes and Graham had secured the information before deciding to discharge them. Devich had told Graham and Varnes in February that the salary projections contained in the October e-mail were inaccurate, "junk," and stale within the meaning of the Confidentiality Agreement (old news). In view of the fact that Varnes was specifically asking Devich whether the October e-mail was covered by the Confidentiality Agreement he was being asked to sign, Devich's remarks clearly implied that the October e-mail would NOT be covered.

Even if Respondent's policy were valid, Varnes and Graham were discussing inaccurate salary information with other employees, which, according to Noyes, was permitted by the policy. In addition, they were discussing information they had been led to believe was not covered by the policy. For those cases where employees had revealed their own salaries, there was no violation of Respondent's policy. In the case of rumors, there would be no "specific, accurate" information discussed. And in the case of projected salaries from the October e-mail, the information was inaccurate and not covered by the policy, according to Respondent's own supervisor, Devich. For all these reasons, Varnes and Graham did not violate Respondent's policy, even assuming its validity.

There is also doubt about Respondent's assertion that its discharge of Varnes and Graham was based on the Confidentiality Agreement at the time it was decided upon. First, the Confidentiality Agreement says nothing on its face about prohibiting discussion among Respondent's employees of accurate salary information. Second, the Confidentiality Agreement was not mentioned to the two employees on August 13, when they were discharged. Third, Stricker did not refer to the Confidentiality Agreement in his August 15 e-mail describing the discharges.

Because Respondent relied on a pretext, its defense fails, and the General Counsel's case has not been rebutted. One additional factor which shows pretext, that Respondent was not concerned about the confidentiality of the information, is Respondent's failure to say anything to Varnes at any time, including at his discharge interview, about deleting the October e-mail from his home server. Had Respondent truly regarded the October e-mail information as confidential, it would have told him to delete the file from his server long since, and cer-

tainly at the discharge interview, when Varnes himself raised the subject of the October e-mail.[10] Respondent's true reason for discharging Varnes and Graham was their discussions with employees about a union and about salaries and other working conditions. Thus, Respondent violated the Act by discharging Varnes and Graham.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, union membership, the union activities of other employees, the union membership of other employees, why they supported a union, and the identities of employees engaged in talking about a union; by prohibiting employees from talking about a union; by prohibiting employees from talking about wages and other working conditions; by threatening employees with trouble and with possible discharge if they did not reveal their union and protected concerted activities; and by maintaining a policy which prohibits employees from discussing their salaries and other conditions of employment, Respondent has violated Section 8(a)(1) of the Act.

2. By issuing warnings to and discharging Quinton Graham and Anthony Varnes because of their union and protected concerted activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent reinstate Anthony Varnes and Quinton Graham to their former positions, without prejudice to either seniority or any other rights or privileges previously enjoyed. I shall also recommend that Respondent be ordered to remove from the employment records of Anthony Varnes and Quinton Graham any notations relating to the unlawful action taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, CFS North American, Inc., d/b/a Convenience Food Systems, Inc., Frisco, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, union membership, the union activities of other employees, the union membership of other employees, why they support a union, and the identities of employees engaged in talking about a union; prohibiting employees from talking about a union; prohibiting employees from talking about wages and other working conditions; threatening employees with trouble and with possible discharge if they did not reveal their union and protected concerted activities; and maintaining a policy which prohibits employees from discussing their salaries and other conditions of employment.

(b) Issuing warnings to employees because of their union and protected concerted activities and discharging employees because of their union and protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the policy prohibiting employees from talking about wages or other working conditions.

(b) Within 14 days from the date of this Order, offer Anthony Varnes and Quinton Graham full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Anthony Varnes and Quinton Graham whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharges, and, within 3 days thereafter, notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Frisco, Texas location copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[10] Respondent made no request at trial for protection of the data or confidentiality concerning it.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 21, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. August 21, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union sympathies or activities or the union activities of other employees.

WE WILL NOT interrogate you about your union membership or the union membership of other employees.

WE WILL NOT interrogate you about the identity of employees who talked about a union.

WE WILL NOT interrogate you about why you support a union.

WE WILL NOT prohibit you from talking about a union.

WE WILL NOT prohibit you from talking about wages or other working conditions with other employees.

WE WILL NOT threaten you with discharge or other negative consequences if you talk about a union with other employees.

WE WILL NOT threaten you with discharge or other negative consequences if you refuse to reveal your union sentiments or activities or those of other employees.

WE WILL NOT threaten you with discharge if you engage in protected concerted activities or union activities.

WE WILL NOT issue warnings to you because of your union activities.

WE WILL NOT maintain an unlawful policy prohibiting you from talking about wages, hours, or other working conditions.

WE WILL NOT discharge you because of your union or concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reinstate Quinton Graham and Anthony Varnes to their former jobs, and WE WILL make them whole for any loss of pay or other benefits they may have suffered because of our unlawful discharges of them.

WE WILL rescind our unlawful policy prohibiting you from talking about wages, hours, or other working conditions.

WE WILL remove from our files any reference to the unlawful warnings and discharges of the employees named in the above paragraph, and notify them in writing that this has been done and that the warnings and discharges will not be used against them in any way.

CFS NORTH AMERICAN, INC. D/B/A CONVENIENCE FOOD SYSTEMS, INC.